# Muslim Personal Law
## and
# Uniform Civil Code

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# PREFACE

The great anxiety Muslims are demonstrating in respect of their personal law and the intensity of their opposition to any change in it at the hands of the State has led many to believe that Muslims are over-emphasising the issue and that it is not reasonable on their part to be so agitated and exercised over the matter. They think that the real cause for their concern is their orthodoxy and undue attachment to their religion. According to them like politics and economy our social and family life should also be *liberated* from the influence of religion and secularism which has come to dominate our political and economic activities should be allowed to make inroads in our homes also.

Persons of this way of thinking mistakenly place Islam at par with other religions and fail to comprehend that it is, in fact, a religion revealed by Allah and that it is a complete and wholesome code of life. They think that even if the social laws of Islam are divine, man should still have the right to amend or alter them.

There are quite a few others who have scant knowledge about the Muslim Personal Law and its significance. These people think that the Muslims insistence on the retention of their Persoanal Law and their protests against all interference in religion is unwarranted. They suffer from the notion that Muslim Per-

sonal Law consists merely of the freedom to have more wives than one. These people argue that Islam has permitted polygamy on the condition of according just and equitable treatment to all the wives and that since it is only a provision and not mandatory hence if polygamy is prohibited through legislation it does not amount to interference in the law of Shariat. According to them there is no harm if the personal law of Muslims is scrapped and a Uniform Civil Code is enacted as its scope, in their view, will be limited to the spheres of marriages only. It is obvious that these people have neither any idea of the real scope of the Muslims' personal law nor that of the contemplated Uniform Civil Code. They do not realise the true significance of the Personal Law of Muslims nor do they comprehend the extent to which a Uniform Civil Code would affect and multilate the laws of Shariat.

It is, therefore, necessary to expound the real significance of the Muslim Personal Law and analyse the arguments advanced by the propounders of a Uniform Civil Code. This work is aimed at acquainting people with the salient features of the contemplated Civil Code as and when it is enacted to be made uniformly applicable to all and to point out the difficult problems and complications it is bound to create. The great concern and anxiety of Muslims on the subject is not unwarranted but is a natural outcome of their faith and belief in their religion.

# WHAT IS MUSLIM PERSONAL LAW

The history of Muslim Personal Law in India in brief is that during the Moghul period the Islamic Law was also the law of the land. Not only the Civil Law but also the law then in force was the Islamic Law and the judiciary enforced and administered those laws. However, the non-Muslims enjoyed full freedom to follow their own religous or customary law in matters of marriages and inheritance etc. Thus each community had its own Personal Law for itself.

Even after 1765 when the East India Company reorganised the judiciary the English judges continued to give judgments according to Islamic Law with the assistance of Muslim jurists. Thereafter, English laws gradually started replacing the laws then in force and ultimately the Islamic Criminal Law was wholly discarded in 1862 and was replaced by the Indian Penal Code which still continues to be in force under the same name. Even then the Islamic Law was retained to govern the family and personal matters like marriages, divorce, inheritance and gifts etc.[1] Due to the influence of non-Islamic culture among certain sections of the Muslims

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1. Please see Chambers Encyclopaedia Vol. IX p. 468.

the local customary law replaced the Islamic Laws. For example following the Hindu custom, Muslim women were not being given any share in inheritance. Hence on the demand made by the Ulema and Muslims in general the Muslim Personal Law (Shariat) Application Act of 1937 was enacted. Under this Act it is provided that in matters of marriages, *Mehr* (dower), maintenance, divorce, *Khula,* judicial separation, guardianship, gift, succession and *aukhaf* where parties are Muslims, the rule of decision shall be the Muslim Personal Law (Shariat).

Therefore, the Dissolution of Muslim Marriages Act of 1939 was passed which laid down the grounds on which a Muslim wife could move the court of law to get rid of her husband. Under this law a woman can obtain a decree of the dissolution of marriage on the grounds of her husband's whereabouts being unknown for four years, non-payment of maintenance for a period of two years, cruelty, failure to accord equal treatment as enjoined by the Quran between wives when there are more than one or his suffering from venereal diseases etc.

Thus it is clear that the Muslim Personal Law relates to the religious provisions of marriages, divorce, *khula* and succession etc. and that it encompasses not only the Islamic Law of marriage and divorce but the entire succession system. The courts are bound to adjudicate on all such matters in accordance with the law of Shariat. For example, if a wife is fed up with the ill-treatment of her husband and the husband does not

agree to a ***khula*** she can have her marriage dissolved through court or if a woman is not given her Quranic share in inheritance she can get it through a court of law.

Although Muslim Personal Law has not been codified still Shariat having been accepted as the rule of decision the Islamic jurisprudence (fiqh) has asumed the status of law and for the guidance and assistance of the law courts some books on Islamic Law have been compiled and published in English language better known among these being the Principles of Mohammadan Law by D.F. Mulla, 'Outline of Mohammadan Law' by A.A. Fayzee and Tyabjee's work on Muslim law. The famous and authoritative work of Hanafi jurisprudence i.e. 'Hidaya' has also been translated into English and is freely quoted in and referred to by law courts. This position continued till Independence and thanks be to Allah it is so even to this day. That the intention of Islamic law in some details is not being fulfilled through the law courts due to the prevalent conditions is rather besides the point and so long as these conditions do exist it cannot be expected to be otherwise.

# IMPORTANCE OF MUSLIM PERSONAL LAW

Islam does not allow the Believers to follow man-made law or custom in matters of marriage, divorce, *khula* and succession etc. On each of these matters there are specific provisions in the Quran and Muslims have been enjoined to strictly adhere to these provisions and are warned of severe retribution in case of contravention. For example after laying down the law relating to marriages the Quran says, "This is the law from Allah and you are bound to obey it". (4:24)

After laying down the law on divorce and *khula* the Quran goes on to say; "These are the limits ordained by Allah. Do not go beyond them and if any one exceeds these limits he is the transgressor" (2:229). After detailing the law of succession it is stressed that "this is the law ordained by Allah" (4: 11), and the description of the succession system in Islam is concluded by saying:

> "And whoever shall contarvene the injunctions of Allah and His Prophet, Allah will throw him in the fire where he shall remain for ever and shall have a humiliating punishment. (4: 14)

The social laws laid down in the Quran have been elaborated by Prophet Mohammad (peace be on him) which is called the Sunnah. Based on the Quran and Sunnah Muslim scholars have developed the Islamic jurisprudence and have compiled the Islamic Fiqh. The provisions in the Quran and Sunnah relating to social order and family law are a very important and integral part of Shariat and have the status of unalterable divine law which has been enjoined upon us to be followed scrupulously:

> "O ye who believe! enter into Islam whole-heartedly (accept it in its totality). (2: 208)
>
> "Follow the revelation given unto you from your Lord and follow not as friends or protectors other than Him" (7: 3).
>
> "And judge between them by what Allah has revealed and do not follow their vain desires, but beware of them lest they beguile you from any of that what Allah has sent down to you". (5: 49)

Hence it is clear that Muslims have no power to make laws for themselves where specific laws are given by Islam nor are they free to follow a course according to their own will and pleasure.

> "It does not befit a believer, man or woman that when a matter has been decided by Allah and His

apostle, to have any option about their decision". (33: 36)

Those who do not adjudicate upon matters in accordance with the laws of Allah have been termed as transgressors and great sinners. Similarly those who accept some parts of religion and reject the other have been sternly reproached.

"Then is it only a part of the Book you believe in and reject the rest?" (2: 85)

Chapter 4 of the Quran elaborately deals with the social laws of Islam and it has been clearly stated therein:

"But no, by your Lord, they can have no real Faith, unless they make you the judge in all disputes between them and do not at all grumble at your decisions but accept them whole-heartedly. (4: 65)

Those who oppose the retention of Muslim Personal Law contend that its being an integral part of Shariat (religious law) should not be a bar to its abrogation because the criminal law of Islam which is also a part of Shariat has already been abrogated and replaced by an un-Islamic Penal Law. It is a strange argument. If a man is compelled to breathe foul air at some place should he also be compelled to give up the clean air when available to him? All laws of Islam, penal or social,

are equally important and liable to be followed. A Muslim can never think of doing away with any law of Shariat. If under the force of circumstances some law other than the Islamic Penal Law has been imposed upon Muslims it does not justify the demand that even such portions of Islamic Laws as are still in force should also be given up. Moreover the propounders of this theory overlook the significant difference between the penal laws and social laws. Penal laws can basically be enforced only by the State. For example, the punishment for theft or adultery can be awarded and exected by the State alone. On the other hand social laws can be followed by individuals and the State comes into picture only secondarily i.e. in adjudicating the disputes etc. Further, the abrogation of Islamic social laws shall have a definite bearing on the moral status of the Muslims. For example if a man divorces his wife according to Islamic law but contravenes the law of the land, the woman shall cease to be his wife according to religious law but under the force of the law of the land her marital status shall continue. It will obviously create a conflicting situation affecting the moral position of both. On the contrary penal laws deal with awarding punishment to the guilty. Therefore, penal laws of Islam not being in force can be an argument for doing away with Muslim Personal Law.

# ARTICLE 44 OF THE CONSTITUTION OF INDIA

The campaign for bringing about changes in Muslim Personal Law is, in fact, aimed at clearing the way for its total abrogation and for replacing it by a Civil Code common to all communities and doing away with all religious laws. The origin of this trend is the Western culture and materialistic view of life but formally the basis for this is provided in Article 44 of the Constitution of India which contains one of the Directive Principles of State Policy. The Article reads:

> "The State shall endeavour to secure for the citizens a Uniform Civil Code throughout the territory of India".

This Article, like other directive principles, however, is just a directive principle for the State and subject to the Fundamental Rights enshrined in the Constitution. Article 25 enumerating a fundamental right says:

> "Subject to public order, morality and health and to the other pravisions of this part, all persons are

equally entitled to freedom of consciene and the right freely to profess, practise and propagate religion".

It is apparent that in view of the right and freedom guaranteed in this Article there can be no room for a civil code which may in effect tantamount to taking away the religious freedom of any community and which compels a member of any community to act against his religion. If so it would clearly amount to interference by State in matters of religion and it shall render meaningless the guaranteed right of freedom of conscience and to profess and practise religion. It is surprising that disregarding the important Article 25, the directive principle in Article 44 is treated as all-pervading.

Enforcing prohibition is also one of the directive principles of State policy as laid down in Article 47 and there is no religious impediment in implementing this directive. But in a number of states it has not been done and even those states which had introduced prohibition are now one after the other lifting it. Kerala and Tamil Nadu have scrapped prohibition and have again gone wet. In Maharashtra, the dry laws have been considerably slackened and the Government is contemplating to lift it altogether. What justification can therefore be for the attitude to avoid by all means the implementation of one guiding principle and to insist on the other which is controversial and which in its very nature necessitates interference in religions?

In any event it is obvious that so long as Article 44, as it is, stands the campaign for a uniform civil code shall also continue and shall be a threat to Muslim Personal Law. No reliance can be placed on the assurances handed down by those in authority that changes will not be effected in the Personal Law unless so desired by the community concerned because by now the worth of such assurances has been well exposed.

These assurances carry no weight further because power in a democracy changes hands as also the governments. Hence there is no guarantee that the promises now made by those in power will also be honoured by those who may succeed them. Hence it is imperative that either Article 44 is altogether deleted or it should be so amended as to safeguard for the Personal Law of Muslims.

When Article 44 (which was Article 35 in the Draft Constitution) was being discussed in the Constituent Assembly Muslim members had moved various amendments to it. Late Mohammad Ismail Sahib (Muslim League, Madras) had tabled the following amendment:

> "Provided that any group, section or community of people shall not be obliged to give up its own Personal Law, in case it has such a law". ('Directive Principles in the Indian Constitution' by K.C. Merkenden P. 193)

Another amendment suggested by Janab Naziruddin Sahib was as under:

"Provided that the Personal Law of any community which has been guaranteed by the State shall not be changed except with the previous approval of the community ascertained in such manner as the Union Legislature may determine by law". (do Page 193)

Moving the amendment Mr. Nazir Ahmad had warned that this Article clashed with the Article guaranteeing freedom of religion and this Article may render it ineffective.

Mr. Mehboob Ali Baig Sahib Bahadur of Madras moved the following amendment:

"Provided that nothing in this Article shall affect the Personal Law of the citizen". (do Page 193)

The fourth amendment was tabled by B. Pokar Sahib Bahadur (Madras) which was closer to the one moved by late Mohammad Ismail Sahib.

There were hot discussions on these amendments in the Constituent Assembly in which besides the above named, M/s K.M. Munshi, M.R. Masani, Allady Krishna Ayyar and others took a prominent part. Mr. K.M. Munshi went to the extent of saying:

"It was the desire of the framers of the Constitution to divorce religion from personal law".

He also referred to certain reforms introduced in Turkey and Egypt in this connection. However, Dr. Ambedkar assured Muslims that a uniform civil code will not be imposed upon them against their wishes. He said that the work of the future Parliament would be to enact a law to the effect that the Uniform Civil Code will cover only those who will make a declaration about their willingness to accept it.

On the strength of this assurance by Dr. Ambedkar all the amendments were rejected and the draft Article 35, the present Article 44 of the Constitution, was passed.

In order to secure a safeguard for the Muslim Personal Law Mohammad Ismail Sahib had also moved to add the following clause to the Article on Fundamental Rights:

> "To follow the Personal Law of the groups or community to which he belongs or professes to belong". (Constituent Assembly Debates Vol. VII p. 721)

But the Constituent Assembly did not accept it and now we are faced with the danger envisaged at the time of adopting the Constitution. As regards the assurances given by Dr. Ambedkar it is perhaps wholly forgotten by the ruling class. Hence, further assurances would be of no avail and it is imperative that through a clear-cut amendment in the Constitution the right of following their Personal Law should be ensured for Muslims. So

long as such an amendment is not made the sword of Uniform Civil Code would continue to hang over Muslim Personal Law.

## SECULAR CHARACTER OF THE STATE

The opponents of the retention of Muslim Personal Law put forth the secular character of the State as an argument in their support. They argue that secularism clearly demands a Uniform Family Law as, according to them, separate Family Laws for different communities mean discrimination between the communities which is repugnant to the secular character of the State. One may well ask these ultra-secularists if India is the only secular country on the map of the world or there are other countries also which profess secularism? Perhaps, they are not aware that there are a number of other secular countries which have left the Muslim Personal Law wholly untouched. Take Thailand for instance where the majority of the people are Buddhists and the Government there has also effected certain reforms in the Family Laws of the Buddhists. But the interference is confined to the Buddhists only and the Muslims have been left free to follow their own Personal Law. Same is the case with Burma. In Greece, the Muslim Personal Law is separately administered through Muslim jurists. Among African countries, in Ethiopia, Ghana, Gold Coast and Uganda the Muslim Personal Law has been retained intact. Most of these countries have a secular Constitution and some of them even profess communist

ideology. Thus when secular character of these countries has not come in the way of retaining the Muslim Personal Law how can it do so in India?

# NATIONAL INTEGRATION

Whenever a communal riot occurs and a political leader feels like giving a statement it is invariably stated that a Uniform Civil Code is a must for achieving national integration. What in effect he means to say is that communal riots break out because of the Personal Law of Muslims and if this were to be abolished and a Uniform Civil Code promulgated there will be an end to the communal riots. This is a quack's diagnosis. The origin of not a single communal riot can be traced to Muslim Personal Law. There have several times been enquiries into the causes of various riots. None of these enquiries revealed the Muslim Personal Law in any degree being the cause of communal riots. What then is the purpose of propping up the issue of Muslim Personal Law in connection with the riots?

Even otherwise a Uniform Civil Code is asserted as imperative for bringing about national integration. Justice Y.V. Chanderchud for example once said in Bombay:

> "One law of marriage for all would be an important step towards national integration".
>
> (Indian Express 21-1-67)

But in fact this is perverted logic. When the minority communities will come to realise that their religious laws and cultural traditions are being abrogated it is bound to have an unfavourable reaction on the minorities which would adversely affect the relationship between the minority communities and the majority community. On the contrary if the majority community, which under the democratic set-up enjoys a decisive position, deals broadmindedly with the minorities and allows maximum religious and cultural freedom to those, the relationship between them is bound to be happy and cordial and shall be highly conducive to the promotion of national integration.

If the logic of the sponsors of a Uniform Civil Code is followed a Uniform Worship Code can more effectively be argued to be imperative for the purpose of achieving national integration. Why allow mosques and temples to separately exist? Why not demolish them all and have only 'National Worship Centres' in their place where people of all communities may offer joint worship under a National Code? And then the object of worship should also not be God but the nation because the difference in the conception of God gives birth to communities and communities breed communalism. Hence elimination of all such things should, according to this logic, be a surer guarantee for national integration. One wondrs why our politicians feel shy to speak such a logical truth.

## TRENDS OF MODERN CULTURE

A very small number of Muslims who have been brought up under the so-called progressive environment support changes in Muslim Personal Law. The real reason behind their stand is not that the Shariat Laws are in fact cruel and are the cause for the evils prevalent in Muslim society and hence some reforms have really become necessary. The real reason behind their way of thinking is that they are dazzled by the false lustre of western civilisation and judging by the superfluous western standards of justice and equality they regard Islamic social order as defective. They have come to believe that the social system of Islam is out-dated as it does not synconise with modern trends. Hence they wish to get rid of all old bonds and form a new social order in accordance with current trend under which man and woman are quite equal in all respects.

Had these Muslims studied the social system of Islam with an open mind without disregarding the human nature and the moral position of man they would have been able to see the beauty and perfect balance in the social order which Islam sets up. No doubt Islam has placed man at a higher grade than woman in its social order but this is in accordance with

the natural and distinct characteristics of man against woman and without this difference in status there can neither be discipline in the family life nor necessary moral values can be retained. It is because of this that the power of the severence of marriage has been conferred on man and the woman has been given the limited right of *khula.* Similarly a daughter is awarded half of her brother's share in her father's property because in the Islamic social system the responsibility of providing manintenance for the family is primarily that of man. Moreover women receive dower from husbands. Hence it is but just and proper that there should be a difference in the respective shares of men and women. But the modern civilisation harping under the misguided notions of equality and justice fails to appreciate the inherent justness and fairness of this arrangement. In its eyes equality is supreme although human nature does not reconcile with this unrestricted conception of equality. A father and a son are quite equal as human beings, still for the father to hold a superior position in the family is a universally acknowledged social phenomenon and the son is expected by all to be considerate and obedient to his father. But if the extremist view of equality is accepted we will have to keep the father and son at equal footing and there will be no question of only the son being obedient to the father and like the son the father will also have to be called upon to be obedient to the son. But the modern society with all its progressivism does not place such a demand on the father.

# CHANGES IN MUSLIM PERSONAL LAW IN MUSLIM COUNTRIES

Those who plead the case of changes in Muslim Personal Law according to current trends do frequently cite the examples of some Muslim countries. They assert that when changes in Personal Law have been effected in several Muslim countries why is it that Muslims in India are piqued at the mere mention of such changes? These people in fact twist facts and exaggerate the real position giving an incorrect impression.

Fact of the matter is that in a majority of Muslim countries no changes have been made in Muslim Personal Law and the Shariat Laws are actually in force there. Saudi Arabia, Yemen, Bahrain, Kuwait, Qatar, Dubai, Afghanistan, the Maldives, Guinea, Senegal, Somalia and Nigeria are outstanding examples. In these countries there are different schools of Islamic jurisprudence (Fiqh) that are in force e.g. Hambali, Maliki, Shafai, or Hanafi, which have the force of law. In Saudi Arabia where Hambali Fiqh is in force it is also a constitutional obligation that all legislations should be based on the Quran, the *sunnah* and the precedents of the *Sahaba* (the worthy companions of the Prophet, P.B.H.). In Yemen, Zaidi Fiqh is in force and in South Yemen Shafai, and Hanafi Fiqh is followed. In Bahrain the Shafai, Maliki and the Shia Fiqh is enforced on

respective parties. In Kuwait the Islamic Family Law is in force and generally the Maliki Fiqh is followed[1]. According to the Constitution of Afghanistan Islam is the State religion and all religious matters are dealt with according to the Hanafi Fiqh. No change whatsoever in the Islamic Law has been effected there. In the Maldives the Shafai school is followed in matters of Family Law. No changes have either been made in Chad, Gambia, Mali, Mauritania, Nigeria, Senegal and Somalia or are under contemplation. In Nigeria, the Maliki Fiqh is the law in matters of succession and family affairs.

The true position about the so-called reforms in Family Laws in certain Muslim countries is that in those countries either of the different schools of fiqh have been awarded the status of law or some subsidiary details of the Islamic Law have been codified or regulated. Even then many of these regulations are simply of administrative nature. There are only two countries which have shown the audacity to scrap the Family Laws of Islam and replace them with a secular form of civil code. These are Turkey and Albania. In Turkey, this change was brought about in 1926 when the Islamic Family Law and Law of Succession was replaced by the Civil Code of Switzerland. But the tyrannical and repressive manner by which Mustafa Kamal distorted Islam and laid the foundation of an irreligious State is now a known fact of history. He even went to the extreme of

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1. Family Law Reform in the Muslim World by Tahir Mahmood, p. 3.

prohibiting the calling of *Azan* in Arabic. So the example of Turkey cannot be reasonably cited to justify changes in Muslim Personal Law. It is also to be borne in mind that even if a country effects certain changes in the Muslim Personal Law in contravention of the Shariat or abrogates it by replacing it with an un-Islamic code, the fact would still remain that it would be an unauthorised act and a transgression and thereby it cannot form a valid precedent for the Muslims of other countries. And while citing the example of Turkey why the conditions in those countries where no changes have been effected are ignored and not taken into account? The names of such countries have been cited above and those are many not just a few.

Even the goverment of Israel has not so far dared to change the Muslim Personal Law. The law enacted in Turkey in 1917 called the 'Ottoman Law of Family Rights' which was based on Shariat and abrogated in 1926 still continues to be in force and govern Muslims in Israel.

As for Pakistan whose example is enthusiastically given be the supporters of the change the real position is that as a matter of fact Muslim Personal Law is in force in Pakistan and not a Secular Code. Certain "reforms" have been brought about through the "Muslim Family Law Ordinance" in 1966. But these reforms are of an administrative nature and certain provisions of Islamic Law have been codified. Some of the prominent 'reforms' are that every marriage has to be registered but non-registration does not render the marriage

illegal. It has just been made an offence liable for punishment. Next reform is that for contacting a second marriage during the lifetime of the first wife, obtaining of permission from the Arbitration Council has been made compulsory. But the contravention of this provision again is made only a penal offence and the second marriage itself is not declared to be invalid which proves that polygamy has not been prohibited. In matters of divorce the husband has been made to first move the Arbitration Council which would endeavour to bring about a rapprochement between the husband and the wife. This shows that the husband has not been divested of the right to divorce but that a forum has been provided for reconciliation.

The fourth 'reform' is in the law of succession through which the orphan grandchildren of a person have been jointly awarded the share which their deceased father would have got from his father had he not pre-deceased his children. These 'reforms' may be subject to criticism from the angle of Shariat but the significant fact which is inescapable is that Muslim Personal Law has not been abrogated and replaced by a Secular Code in Pakistan nor any major departure has been made from the basic Islamic Law.

In this context it should also not be overlooked that these 'reforms' were strenuously opposed by the Ulema and there was widespread protest gainst them by the people. But the dictatorial regime which was then in power did not, true to its universal characteristic, heed the popular voice. A dictatorial action cannot form

precedent for a democratic country like ours.

Moreover it is to be specifically noted that the goverment made these 'reforms' in the Personal Law of Muslims alone who are in majority in Pakistan but it did not do so in respect of the minorities inhabiting that country. That being so it is obvious that the 'reforms' effected in the Personal Law of Muslims in Pakistan cannot form a valid basis for changes in Muslim Personal Law in India where Muslims are a minority community.

# FEATURES OF THE UNIFORM CIVIL CODE

If the Government succeeds in imposing a Uniform Civil Code its sphere of operation will not be limited to banning polygamy but it will encompass all matters relating to marriages, *khula*, dissolution of marriages, and succession etc. also and the Code will be applicable to all the citizens be they Muslims, Hindus, Christians or Parsis. This piece of legislation will be wholly regardless of any religious law. It will therefore clash not only with the Ijtehad or the consensus of the Ummat but the clear mandate and injunctions of the Quran and Sunnah will also be affected by it.

The exact nature of the contemplated Uniform Civil Code would be known only as and when it is drafted and imposed but the broad outlines and silent features are not hard to be imagined even now because in any event it will be according to the majority wishes as is the parliamentary procedure for every legislation in a democracy. It is well known that the mind of the majority is deeply influenced by the West and its thinking is borrowed from it and toeing that line of thinking it is also of the view that polygamy should be banned; the right to divorce should not be with the husband but should lie with the courts; sons and daughters should get equal share in succession and so on. The majority

opinion has already been expressed through the Hindu Code Bill consisting of Hindu Marriage Act, the Hindu Succession Act and the Hindu Adoption and Maintenance Act. In the mirror a fair reflection of the contemplated Uniform Civil Code can very well be seen.

The apprehension is well supported by Mr. Duncan, Professor of Oriental Laws in London University. He says:

> "The Civil Code promised in Article 44 of the Constitution is like the 'Hindu Code' of which we have spoken before, a nuisance, but a convenient one". (Religion, Law and the State in India by J. Duncan, p. 546).

Anything different than the known mind of the majority community cannot be expected. There may be some difference in details, but in fundamentals the contempleted Civil Code will have to be similar to the Hindu Code. In other words the contemplated Uniform Civil Code is going to be the Hindu Code with slight modifications. It is, therefore, relevant to have a look at the existing Hindu Code to find out how it conflicts with the Muslim Personal Law.

As per the Hindu Marriage Act 1955, a person cannot take a second wife in marriage during the life-time of the first wife.[1] Whereas Islam permits having four

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1. Any marriage between two Hindus solemnised after commencement of this Act is void, if at the date of such marriage neither party had a husband or wife living and the provisions of section 494 and 495 of the Indian Penal Code shall apply accordingly (S. 17) (It may be noted that bigamy is punishable with imprisonment for seven years in the Penal Code).

wives at a time conditional to a just and equal treatment. This provision has been made under various valid and practical considerations as sometimes a second marriage becomes inevitable. For example, a wife may be permanently ill and sick or she may be incapable of bearing children. In such case there are two courses open for the husband. He may either divorce his wife and then marry another woman or he may take a second wife without divorcing the first. Obviously the latter course is preferable to the former. But in case of polygamy being banned only the former course will be available and that cannot be a welcome situation for any woman.

Provision for more marriages than one is also necessary for the problem of widows. The most important aspect is that Islam which is a Deen (Religion) keen on promoting piety and righteousness has, through this provision, curtailed licentiousness and immorality. In Western culture there is insistence on monogamy and there is no restriction on illicit relationship with any number of women. Moreover the Western culture provides all the incentives for sexual anarchy and creates conditions to render it impossible for man to be content with one woman and at the same time enforces monogamy through law. Does it then in fairness lie in the mouth of these so called modernists to espouse the cause of monogamy and putting a ban on decent and religiously permissible methods?

In matters of divorce also the Hindu Code is contrary to the Islamic Law. Under the Code the husband

does not have the right to divorce his wife but either of the spouses wishing to severe the marital relationship has to move a court of law and the court will award a decree only if it is satisfied that any one of the grounds enumerated in the Code does exist. In any event the court shall not entertain an application whithin three years of the solemnisation of marriage.

In Islam the husband has been given the right to divorce and the woman has been awarded the right to obtain *khula*. The Hindu Code negates the right of both. Neither the husband has the right of divorce nor the wife that of *khula*, but both are bound to move a court. The demerits of this system are obvious. It is not always desirable to take the private affairs of a married couple to the open courts. Then to prove an allegation in a court of law, even though true, is not easy with all the intricacies of legal wrangles. It is, therefore, quite likely that a husband in order to avoid the complications of a legal procedure may simply discard his wife or shall take recourse to level false but dirty accusations against the wife so as to obtain a decision in his favour. Similarly, as against the simple method of seeking *khula* a wife shall also have to undergo the protracted hardships of presenting her case in a court of law. And if even after a long legal battle in law courts she loses the case the fate of her future life with her husband can well be imagined. Taking everything into consideration it has to be conceded that subjecting the parties to a court's decree in this matter is in no way helpful for the women.

There arises a further question. In case the husband is, as per law, divested of the right to give divorce, and he still divorces his wife finally as permitted by *Shariat,* what shall then the position be? The law of the land shall not recognise the divorce and thereby as per law the woman shall continue to be his wife although she shall no more be his wife as per religion. There is a further complication also. Even if a husband has definite knowledge about adulterous activities of his wife but is unable to produce the proof as required by law court he will have to continue to live with her as he will be having no right to divorce her. The situation will be extremely distressing specially for Muslims because morality is the supreme concern of Islam.

In the matter of maintenance the Hindu Code provides that in case of a decree for separation the court shall order the losing party to continue to provide the applicant with maintenance commensurate with the status of the parties till such time as the applicant either contacts a second marriage or expires. Thereby even a woman has been made liable, like man, to provide her husband with maintenance even after the relationship of husband and wife between them ceases to exist. It only means that the real intention is to render the severance of marital ties more and more difficult without any consideration of the evil consequences that are bound to follow. In case a husband does not wish to retain a woman as his wife and finds it extremely difficult to get rid of her he can find various ways to make life hell for her.

In matters of succession the Hindu Succession Act is now in force which is also a part of Hindu Code. This is based not on the Shastras – in fact it is a major departure from the conventional Hindu Law of the Shastras – but is based on the so-called modern trends. The rules of succession as provided in the said law are briefly as under:

1. The successors in the first category, which includes the son, daughter, widow, mother and grandson and grand-daughter of a pre-deceased father shall get equal share but the grand-children shall together have one share.
2. In case there is no surviving member of the first category the estate will devolve on the members of other categories in order of precedence. The children of the paternal grand-children, brother and sister, are placed in the second category. The third category includes the children of the maternal grand-children. The nephews come in the fourth category, the grand parents fall in the fifth, the widowed mother and the widow of the brother come in the sixth and uncles and aunts come in the seventh category.
3. The estate of a female shall in the first instance go to her children including the grand-children of pre-deceased father (who shall together have a share equal to that of their father) and husband. The husband's successors form the second category; the parents form the third, and the successors of

the father and mother form the fourth and last category respectively.

This law of succession which in all probability shall be a part of the contemplated Uniform Civil Code with slight alterations is basically different from the Islamic Law of succession. In Islamic Law the daughter gets half of her brother's share, the rationale of which has been discussed earlier. But the modern trends close their eyes from realities and propound a blind conception of equality under which males and females are put on equal footing and the Hindu Code has followed the same pattern. Otherwise females used to get no share whatsoever under the conventional Hindu Law. It shows the two extremes whereas Islam strikes at a moderate course.

In Islamic Law the share of a widow is fixed at 1/4 if there are no issues and 1/8 otherwise. The mother's share is 1/6 in case the deceased has left any children behind and 1/3 otherwise. But under the Hindu Code the mother, the widow and the sons and daughters get equal shares.

Under the Islamic Law of Succession the father of a deceased son gets 1/6 share in case the son dies leaving his own children and in case he dies issueless the father shall get the residue of the shares of the widow and the mother and in case neither widow nor mother is alive the father receives the whole estate. But in the Hindu Code the father has been placed in the second category which means that in case of either the children or

widow or the mother being alive the father shall get no share whatsoever in the inheritance of his deceased son. The conception of modern equity appears to be that the mother should invariably inherit and the father may be kept deprived.

In Islam, no share has been provided for distant relatives while nearer relatives are alive but a provision has been made to make will in their favour to the extent of 1/3 of the whole estate which provision also adequately solves the problem of an orphan grand-child. But the order of succession in the Hindu Code is vastly different and even in the presence of nearer relatives the distant kindred have also been provided with shares in inheritance.

It is obvious that the principles of the Islamic Law of succession have been, to a limited extent, adopted while formulating the Hindu Code on this subject as for example in allowing share to daughters, still this Code is fundamentally at variance with Islamic Law of succession. Thereby, if this Code as it is or even with slight modifications, becomes the Civil Code for all the citizens of India it will create very grave problems for Muslims. Some relations will get less than what is allowed under Islamic Law and some will get more and some will be wholly deprived. He who gets more than the share prescribed for him in the Quran will thus be committing transgression and sin. In other words propounders of the Uniform Civil Code want Muslims to be forced to use that which is *'haram'* for them.

# THE INDIAN SUCCESSION ACT

In the preceding chapter we have quoted certain provisions of the Hindu Code in order to show the salient features of the contemplated Uniform Civil Code. Even then if it were to be argued that it is not fair to contemplate a Uniform Civil Code on the basis of the Hindu Code, it can further be visualised through the Indian Succession Act, 1925, and Special Marriage Act of 1954.

The Indian Succession Act is applicable to all citizens of India excluding the Muslims, Hindus, Buddhists, Jains and Sikhs. The Law of Succession as laid down in the said Act is briefly stated below.

1. There is no restriction on the disposal of property through will. A man can will the whole of his property in favour of anyone he likes (Sec. 59).
2. In case of intestacy where survivors include a widow and children, the widow will get 1/3 share and the children, any number of them, shall together have the remaining 2/3 (Sections 33 to 43).
3. In case there are no issues the widow shall get 1/2 and the other relations shall share the rest.

4. If there is no surviving widow the children shall inherit the entire estate and if there are no issues it shall go to the other relatives and if there are no relations the estate will come under escheat i.e. will be taken over by the State.
5. The husband of the deceased shall get the same share as the widow gets in the estate of her husband.
6. Sons and daughters get equal share.
7. The grand-children will inherit the share of their pre-deceased father.
8. If the deceased is issueless and leaves behind a widow then after deducting the share of the widow the whole of the residue shall go to the father if alive otherwise it shall be divided equally between the mother, brothers and sisters.

This Act is also fundamentally different from the Islamic Law of Succession. In Islamic Law the right of testamentory disposition is restricted to 1/3 whereas the Indian Succession Act places no restriction. Islam has fixed the share of a daughter as half of the son whereas this Act awards equal share to both. Islam awards 1/4 share to the widow if there are children and 1/8 otherwise but under this Act she gets 1/3 and in case of there being no offsprings her share is 1/2. Similar is the case with the share of the husband whereas under the Islamic Law the husband is entitled to half share when there are no children and to 1/4 otherwise.

Islam provides a share for the parents also even though there are issues but under this Act the parents are totally deprived where there are children of the deceased.

This is sufficient to prove that even if the contemplated Uniform Civil Code is going to be on the lines of the Indian Succession Act, then also the entire structure of the succession system of Muslims shall be altered and an Act which is clearly in conflict with the Shariat and is also not *per se* just and feasible shall be imposed upon Muslims.

## SPECIAL MARRIAGE ACT

Under the Special Marriage Act, 1954, a man and a woman belonging to different communities professing different religions can marry provided only that they make a declaration in writing before the Marriage Officer that they are contacting the marriage under this Act.

Some of the provisions which contravene the Shariat Law are the following:

1. Bigamy is an offence punishable with imprisonment which may extend to seven years.
2. Marriage with the child of father's brother and sister and with that of mother's brother and sister is prohibited which is permitted in Islam.
3. Divorce can be only through court and only on one or more of the grounds enumerated in the Act after satisfying the court that such a ground exists.
4. Even if the husband and wife both are willing for a separation they have still to go to a court for this purpose.
5. No application seeking divorce can be made to court before the expiry of three years of the marriage.

6. Even after a decree for divorce neither party can contact another marriage before the expiry of a peirod of one year.
7. In case of separation through court the husband shall have to pay alimony to the wife till she either remarries or dies.
8. The parties marrying under this Act shall be governed by the Indian Succession Act of 1925.

## MUSLIMS' STAND

The brief survey of the Hindu Code, the Indian Succession Act and the Special Marriage Act, made in the preceding pages makes it clear that the contemplated Uniform Civil Code is bound to follow the same pattern and, secondly, that the mind which has not hesitated to legistlate so many enactments can unhesitatingly have yet another as the Uniform Civil Code. The third thing which is made clear is that in matters governing the family set-up, the mind of the majority is synonymous with the trends of modern culture and that the current trends and ideas form the basis of all these enactments. And, finally, it is also evident that it is not at all difficult to visualise the pattern of the would-be uniform civil code, which is clearly reflected in these Acts.

How can then a Muslim who believes Islam to be divinely revealed religion and admits the Muslim Personal Law to be an integral part of Shariat, oppose the retention of Muslim Personal Law and favour a Uniform Civil Code? He cannot even accede to any such alteration in the Muslim Personal Law as may be, in any degree, contrary to the intentions of the Quran and Sunnah in order to satisfy the whims of modern civilisation.

Thanks to Allah that Muslim opinion in the matter is quite alive and does not at all favour any change in Muslim Personal Law. It is further gratifying that Muslim women, in the name of whose amelioration a Uniform Civil Code is proposed and regarding whom an impression is sought to be created that they are disgusted with the Muslim Personal Law and want a change in it, have also realised the danger and have come out in the field for the protection of their Personal Law. They have vociferously supported the retention of Muslim Personal Law through heavily-attended gatherings in Bombay, Nagpur, Nanded, Parbhani, Hyderabad, Poona, Ahmadabad, Lucknow, Allahabad, Bangalore, Calcutta and Kanpur. They have unequivocally declared with one voice that they are wholly satisfied with the Muslim Personal Law and that it is wholly adequate for them.

In view of the significance and importance of Muslim Personal Law, it being an integral part of the religion of Islam, and also in view of the great public opinion on the issue, there can be no justifiction for the demand, be it from any quarter, to abrogate or to effect changes in the Muslim Personal Law. For such a demand to come from Muslims is particularly unbecoming and as for non-Muslims, if they view the issue in its right perspective and appreciate the difficulties and complications involved they are quite likely to be tolerant and broad-minded in the matter and will not harbour misgivings about Muslims' insistence on the retention of their Personal Law as they would realise that it is the religious obligation of Muslims. The State should also

likewise try to properly understand and appreciate the position taken up by Muslims and should refrain from taking any step which may amount to interference with the religion. On the other hand, the State should strengthen democracy and its secular character by according maximum religious and cultural freedom to its citizens.

## RIGHT APPROACH

It is hardly disputable that due to increasing irreligiousness among Muslims considerable degeneration has set in the Muslim society. Both men and women do not discharge their due obligations towards each other. Muslim men abuse their status of being the *kiwam* (protectors and maintainers of women) conferrd upon them by Islam. But Islam and its Shariat cannot be held responsible for this. The responsibility, in fact, lies squarely on the people because it is the result of non-observance of the teachigs of Islam. Hence it will be a wrong approach to hold the Islamic Laws at fault and bring about laws contrary to Islam as a remedy for this. Afterall, in almost all the spheres of Muslim society, there is much to be desired and if all shortcomings are to be attributed to Islam then the whole of Islam will have to be scrapped and for the remedy of every ill we may have to turn to the modern civilization. Having doubts about Islam and to have blind faith in the modern civilization is nothing short of believing a deadly poison to be the nector.

What is required for reforming the society is to promote Allah-fearingness among people, to educate them in the real teachings of Islam, to arouse the sense

of morality and the realisation of their objective in life among the people so that they may adopt Islam as a way of life and be in a position to properly follow its guidance in every sphere of life. At the same time it cannot also be denied that in view of the prevalent conditions in the Muslim society a reappraisal should be made to find out the extent to which the Shariat laws are not being followed, and especially in view of the injustices towards Muslim women, the spheres of divorce and *khula* etc., should be looked into and effective remedies within the bounds of religion should be adopted to save Muslim women from hardships they are suffering from. Islam makes ample provisions for such re-assessment and for the framing of necessary regulations. However, it should be borne in mind that every Tom, Dick or Harry is not capable of undertaking this task and particularly not those who are blindly impressed by western civilization or who think in terms of political exigencies. This is to be done by those who have a thorough knowledge of religion and have developed an insight in religious matters, live a life of piety and are also abreast with the modern trends. It is gratifying that people with such qualifications are devoting their attention to this matter and collective deliberations have started. It can well be hoped that proper measures will thus be devised for a satisfactory solution to this problem.